

(2001) 07 GUJ CK 0145

In the Gujarat High Court

Case No : Special Civil Application No. 8259 of 1996 with Special Civil Application No. 2566 of 1997

R.K. Jadeja

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 03-07-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 227, 309
Industrial Disputes Act, 1947 — Section 10(1), 2(j), 2(j), 2(p), 25(f)

Citation : (2003) 23 GLH 546

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : Girish Patel and Mr. P.H. Pathak, for the Appellant; A.D. Oza, Ld. Govt. Pleader with Mr. H.C. Patel, AGP for Respondents Nos. 1, 2 and 3, for the Respondent

Judgement

K.M. Mehta, J.—R.K. Jadeja and Gujarat Rajya Ardhasarkari Audhyogik Karmachari Sangh (petitioners in Special Civil Appln. No. 8259/96) have filed this petition against the State of Gujarat, Deputy Conservator of Forest under Articles 226 and 227 of the Constitution of India. In the petition it has been alleged that petitioners employees are daily rated employees and belonging to Class IV employees and as State of Gujarat and Forest Department denied certain benefits of leave pay scale to the employees of the Forest Department, they have filed this petition praying that the respondents be directed to implement the said benefits as granted to the daily wage employee of other departments. The facts giving rise to this petition are as under:

1.1 In the petition it has been submitted that there are large number of daily rated employees engaged by Forest Department of State of Gujarat. They are engaged in Nurseries as Labourers and Watchman for protection and plantation of forests. It has been submitted that as regards labourers are concerned they are concerned in connection with plantation of trees and ultimately growth of trees of forest. They called it category No. 1 of daily rated workmen whereas

watchman is concerned they have to look after the protection of plantation after the trees have grown up and the maintenance of the forest (Category H).

1.1(a) It has been averred in the petition that petitioners are daily rated employees of the forest department and they have completed more than 5 to 10 years of service. It has been stated that they are not granted the benefits of the Government Resolution dated 17th October, 1988, on the ground that the resolution is not applicable to the employees of the Forest Department. It has also been contended that this issue is covered by judgment of this Court (Coram: M. R. Calla, J.) in Special Civil Application No. 8589 of 1996 and others decided on 11th March, 1997. It was further stated that the Union has represented to the respondent No. 1 to implement the judgment in favour of all the daily rated employees of the department, however no steps are taken by the department. It has been stated that the workers are threatened for termination of their services and to avoid implementation of the order of this Court, the present petition has been filed. In this petition the petitioners have prayed for issuance of an appropriate writ, direction in the nature of mandamus and/or certiorari declaring the impugned inaction on the part of the respondents not extending the benefits of resolution dated 17th October, 1988, to the petitioner employees as illegal, unjust, arbitrary and violative of Articles 14 and 16 of the Constitution of India.

1.1(b) However, it appears that the Government has filed affidavit-in-reply and ultimately the petitioners have filed additional affidavit-in-reply in this behalf. In the additional affidavit-in-reply, over and above the aforesaid grievances which has been raised by the petitioners, the petitioners have stated that there was some difference and dispute arose between the workers and the State Government and there are subject-matter of the judicial decision by the Industrial Tribunal, this Hon'ble Court and the Hon'ble Supreme Court and therefore it was submitted that in any view of the matter, the authority must implement those decision between the parties. It was, therefore, submitted that this Court may take into consideration about those proceedings in deciding this matter. In view of the same, I have referred the following facts which has been indicated by the petitioners in the affidavit-in-rejoinder in this behalf. The petitioners have also produced the resolution dated 17th October, 1988, which provides certain benefits to be given to certain employees who have completed different periods and different benefits to be given in this behalf.

1.2 It was also contended that on 1-10-88 between employees of Forest Department and Government a settlement as per Section 2(p) of the Industrial Disputes Act was arrived at by which certain benefits have been conferred on the employees.

2. BACKGROUND OF THE MATTER (1st Award) (1st Round of Litigation)

2.1 As difference and dispute arose regarding service conditions of the workmen employed by the Forest Department on one hand and employees on other hand the said dispute referred to Industrial Tribunal (hereinafter referred to as

"Tribunal") for adjudication u/s 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") by Government of Gujarat to the Industrial Tribunal. Before the Tribunal on behalf of workers several demands were raised in connection with working conditions of the workers who are working in the forest department. Though workers filed statement of claim at Exh. 5, the State Government did not remain present and did not file written statement.

2.1(A) Ultimately, when matter was heard the Industrial Tribunal, Ahmedabad by its judgment and award 11th May, 1992, pleased to direct that so far as workers who are working and who have completed 900 days in aggregated before 1-1-1989 continuously in service such workmen are made to be permanent on 1-1-89 and shall be paid pay and allowances in the pay scales prescribed for the post of watchman in the other Government departments besides other benefits which are usually given to the regular watchman in other Government Department. So far as workmen who have completed 900 days after 1-1-89 then those benefits extended on the date on which the workman completed 900 days however the nature of benefits to be given to the workers remains the same.

2.2 Being aggrieved and dissatisfied with the aforesaid judgment and award, the Chief Conservator of Forests, Baroda filed a Special Civil Application being SCA No. 468 of 1994 before this Court. This Court by its judgment and order dated 18-8-1994 pleased to reject the said petition by passing short but speaking order in this behalf.

"The petition is directed against the judgment and award of the Industrial Tribunal granting the Demand No. 1 with regard to making employees permanent with effect from 1-1-1989. The reasons and findings recorded by the Tribunal are eminently just and proper. There is no jurisdictional error, nor any error of law apparent on the face of the record is pointed out so as to invoke the jurisdiction of this Court under Art. 227 of the Constitution of India. Hence rejected."

2.3 Being aggrieved and dissatisfied with the aforesaid judgment and order of this Court, the Chief Conservator of Forests had filed an appeal before the Hon"ble Supreme Court being SLP No. 5590 of 1996 and the Hon"ble Supreme Court by its order dated 15-7-96 pleased to dismiss the Special Leave Petition.

1st Award 2nd Round of Litigation

2.4 In spite of the aforesaid judgment and award of the Tribunal which has become final upto the Hon"ble Apex Court, some of the watchmen of the Forest Department, who have not been given the benefits which flows from the award of the tribunal, in those cases, some of the workers have filed a writ petition under Article 226 of the Constitution of India against State of Gujarat being Special Civil Application No. 7786 of 1997 (filed by Ajitsingh Jethubha v. State of Gujarat) and this Court by its judgment and decree dated 10-8-99 in para 5 pleased to pass following order:

"The writ petition is therefore allowed. The respondents are directed to grant all

the benefits to these six persons emerging from the Award dated 11-5-1992 within a period of two months from today. The petition is accordingly disposed of with no order as to costs."

2.5 Being aggrieved and dissatisfied with the aforesaid judgment and order of the learned Single Judge, the State of Gujarat filed Letters Patent Appeal No. 304 of 2000 before this Court. The Division Bench of this Court (Coram: J. M. Panchal, J.) by its judgment dated 17-7-2000 pleased to dismiss the appeal, however the Division Bench pleased to observe as under:

"As a consequence, we dispose of the Letters Patent Appeal summarily only with the observations that the benefit of the award of the Tribunal be extended to the six workmen before us, but only after examining their individual case on facts. Let the order be now implemented within a period of two months from the date of this order. The Letters Patent Appeal stands disposed of accordingly."

2.6 Being aggrieved and dissatisfied with the aforesaid judgment of this Court, the State of Gujarat had filed an appeal before the Hon"ble Supreme Court being Civil Appeal No. 6412 of 2000 and the Hon"ble Supreme Court by its judgment and order dated 26-3-2001 pleased to dismiss the appeal. While dismissing the aforesaid appeal, the Hon"ble Supreme Court observed as under:

It is contended by learned counsel for the appellants that the respondents were engaged only on projects which were funded by the World Bank and once the projects come to an end, the question of their being continued in service does not arise.

This contention has not been squarely raised either before the Tribunal in another proceedings or in the proceedings before the High Court at any stage. In the absence of this contention, we are unable to accept the submission of the learned counsel for the appellants. The Single Judge as well as the Division Bench had proceeded on the basis that the respondents were employees of the Forest Department. On an earlier occasion, when the employees of the Forest Department had gone to the Labour Court and succeeded in getting an award in their favour, the same was upheld by the High Court and also by this Court.

In view of the aforesaid, we must proceed on the basis that the respondents were the employees of the Forest Department and not working on any project, there being no evidence to this effect, and, therefore, the order of the High Court calls for no interference. The appeal itself is dismissed. No costs.

2nd Award

2.7 The petitioner further submitted that, as indicated above, as there was difference and dispute arose earlier between workmen employed by the Forest Department and State of Gujarat, the workers raised also other dispute and the said dispute was referred for adjudication u/s 10(1) of the Act somewhere on 4th April, 1989, to Industrial Tribunal, Ahmedabad. One of the dispute before the Tribunal was as to whether the workers who have completed 240 days may be

made permanent or not. In that matter, the workers also filed a statement of claim and the Government also resisted the said demand by filing the written statement.

2.7(A) The Tribunal by its judgment and award dated 13-5-1992 (Second Award) by its operative order directed that, so far as daily rated workmen who are labourers who are working in connection with the growth of plantation were concerned namely Chokidar and labourers, the Tribunal held that the persons who have already completed 900 days in the aggregate prior to 1-4-89 shall be deemed to be made permanent on regular establishment w.e.f. 1-4-89 in the time scales prescribed for Class IV service. The Tribunal further directed the Government that all such daily labourers who have completed 240 days in each of 4 or more than 4 years after 1-4-89 or who have completed 900 days of service in the aggregate after 1-4-89 shall be made permanent on such subsequent date and shall be paid the time scale prescribed for Class IV service.

2.8 Being aggrieved and dissatisfied with the aforesaid judgment and award of the Tribunal, the Deputy Conservator of Forests had filed a writ petition before this Court being Special Civil Application No. 9002 of 1993. The matter was heard by this Court finally and after considering all rival contentions, this Court (Coram: P. B. Majmudar, J.) on 10-11-2000 has dismissed the said petition and confirmed the judgment and award of the Tribunal.

2.9 Being aggrieved and dissatisfied with the aforesaid judgment and order of this Court, the Forest Department has filed Letters Patent Appeal before this Court which is pending.

Contention of Learned Advocate of petitioner :

3. Shri Girish Patel, learned Senior Counsel instructed by Mr. P. H. Pathak, have appeared on behalf of the petitioner.

3.1 Shri Patel, learned Senior Counsel submitted that this petition raises a question regarding man power planning, policy and regularisation of daily rated workmen. The workers who are concerned with this petition they are engaged in plantation of the forest, growth of the forest, development of the forest and also for preventing any damage which may occur to the Forest.

3.2 The learned Counsel for the petitioner has relied upon Article 39(b) which provides directive principle of policy with certain objectives. It provides that the State should direct its policy towards securing the right of citizens, men and women, to an adequate means of livelihood; that the ownership and control of the material resources of the community be so distributed as best to subserve the common good. He has also relied upon Article 48(A) which provides protection and improvement of environment and safeguarding of forests and wild life. The said articles provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wile life of the country. He has also relied upon Article 51(A) which falls under Chapter

fundamental duties. The submission based upon Article 51(A) that it shall be the duty of every citizen of India particularly under Article 51(g) which provides that it shall be duty of every citizen of India to protect the natural environment for living creatures. He submits that the conjoint reading of all these articles, the development, growth and maintenance of forest are the most important function of the State. It is indirectly helping the environment of the place in question.

3.3 A strong reliance has been placed by the petitioner on the judgment of the Three-Judge Bench of the Hon''ble Supreme Court in the case of Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., . Referring to para 1 on page 296 he submitted that, as observed by the Hon''ble Supreme Court the first and foremost question before the Court was whether Forest Department of the State Government is an "industry" within the meaning of Section 2(j) of the Industrial Disputes Act, 1947, which definition has been adopted by the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The second question is as to whether the State Government had indulged in any unfair labour practice of the State Act as alleged by the respondents before the Industrial Court, Pune/Ahmednagar. Therefore the Hon''ble Supreme Court thereafter decided to consider the first question first. The learned Counsel submitted that in para 3 of the judgment, the Hon''ble Supreme Court referred seven-Judge Bench decision of the Hon''ble Apex Court in the case of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, . In the said decision the Hon''ble Supreme Court referred the various judgments of the Court and in para 4 the Hon''ble Supreme Court referred the dominant nature of test which was held by the Court in Bangalore Water Supply case. In para 6 the learned Counsel of the Forest Department submitted that the Forest Department is not an industry because the function discharge by the department, more particularly the one relatable to the scheme in question, named Pachgaon Parwati Scheme undertaken in Pune District, is sovereign in nature. Thereafter what is sovereign and non-sovereign the Hon''ble Supreme Court considered various judgments in this aspect in paras 12 and 13 of the judgment. Thereafter the Hon''ble Supreme Court considered the contention of the learned counsel for the petitioner as to whether the scheme in question which is meant for preservation of forests and environment as part of inalienable function inasmuch as the type of work which was undertaken under that scheme could not have been done by a private individual or entity. Thereafter the Hon''ble Supreme Court ultimately individually examined the facts of the case and in para 17 the Hon''ble Supreme Court observed as under:

"This being the position, we hold that the aforesaid scheme undertaken by the Forest Department cannot be regarded as a part of the sovereign function of the State, and so, it was open to the respondents to invoke the provisions of the State Act. We would say the same qua the social foresting work undertaken in Ahmednagar District. There was, therefore, no threshold bar in knocking the door of the Industrial Courts by the respondents making a grievance about adoption of unfair labour practice by the appellants."

3.4 As regards second question of unfair labour practice also the Hon''ble Supreme Court also considered the financial position of the State in para 28 it has been observed as under:

"Insofar as the financial strain on the State Exchequer is concerned, which submission is sought to be buttressed by Shri Dholakia by stating that in the Forest Department itself the casual employees are about 1.4 lakhs and if all of them were to be regularised and paid at the rate applicable to permanent workmen, the financial involvement would be in the neighbourhood of Rs. 300 crores - a very high figure indeed. We have not felt inclined to bear in mind this contention of Shri Dholakia as the same has been brought out almost from the hat. The argument relating to financial burden is one of despair or in terrorism. We have neither been impressed by the first nor frightened by the second inasmuch as we do not intend that the view to be taken by us in these appeals should apply, *proprio vigore*, to all casual labourers of the Forest Department or any other Department of the Government."

3.5 Thereafter in para 29 the Hon''ble Supreme Court observed as under:

"We wish to say further that if Shri Bhandare's submission is taken to its logical end, the justification for paying even minimum wages could wither away, leaving any employer, not to speak of model employer like the State, to exploit unemployed persons."

3.6 In para 30 ultimately the Hon''ble Supreme Court dismissed the appeal and confirmed the order of the Industrial Court.

3.7 The learned counsel for the petitioner has also relied upon the Three-Judge Bench judgment of the Hon''ble Supreme Court in the case of General Manager, Telecom Vs. A. Srinivasa Rao and Others, . The question arise before the Hon''ble Supreme Court whether telecommunication department is an industry or not. In para 7 after referring to the earlier decisions the Hon''ble Supreme Court has observed as under:

"A Two-Judge Bench of this Court in Theyyam Joseph case held that the functions of the Postal Department are part of the sovereign functions of the State and it is, therefore, not an "industry" within the definition of Section 2(j) of the Industrial Disputes Act, 1947. Incidentally, this decision was rendered without any reference to the Seven-Judge Bench decision in Bangalore Water Supply. In a later Two-Judge Bench decision in Bombay Telephone Canteen Employees" Assn. case this decision was followed for taking the view that the Telephone Nigam is not an "industry". Reliance was placed in Theyyam Joseph case for that view. However, in Bombay Telephone Canteen Employees" Assn. case (i.e. the latter decision), we find a reference to the Bangalore Water Supply case. After referring to the decision in Bangalore Water Supply it was observed that if the doctrine enunciated in Bangalore Water Supply is strictly applied, the consequence is "catastrophic". With respect, we are unable to subscribe to this view for the obvious reason that it is in direct conflict with the Seven-Judge

Bench decision in Bangalore Water Supply case by which we are bound. It is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply or to bypass that decision so long as it holds the field. Moreover, that decision was rendered long back - nearly two decades earlier and we find no reason to think otherwise. Judicial discipline required us to follow the decision in Bangalore Water Supply case. We must, therefore, add that the decisions in Theyyam Joseph and Bombay Telephone Canteen Employees" Assn. cannot be treated as laying down the correct law. This being the only point for decision in this appeal, it must fail".

3.8. The learned Counsel for the petitioner has also relied upon the judgment of the Hon"ble Supreme Court in the case of Dhirendra Chamoli and Another Vs. State of U.P., . In para 3 on page 639 the Hon"ble Supreme Court has observed as under :

"We, therefore, allow the writ petitions and make the rule absolute and direct the Central Government to accord to these persons who are employed by the Nehru Yuvak Kendras and who are concededly performing the same duties as Class IV employees, the same salary and conditions of service as are being received by Class IV employees, except regularizations which cannot be done since there are no sanctioned posts."

3.9. The learned Counsel for the petitioner has also relied upon the judgment of the Hon"ble Supreme Court in the case of Daily Rated Casual Labour employed under P & T Department through Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, . In para 7th Hon"ble Supreme Court has observed as under :

"In Dhirendra Chamoli and Another Vs. State of U.P., this Court has taken almost a similar view with regard to the employees working in the Nehru Yuvak Kendras who were considered to be performing the same duties as Class IV employees. We accordingly direct the Union of India and the other respondents to pay wages to the workmen who are employed as casual labourers belonging to the several categories of employees referred to above in the Postal and Telegraphs Department at the rates equivalent to the minimum pay in the pay scales of the regularly employed workers in the corresponding cadres but without any increments with effect from 5th of February 1986 on which date the first of the above two petitions, namely, Writ Petition No. 302 of 1986 was filed. The petitioners are entitled to corresponding Dearness Allowance and Addl. Dearness Allowance, if any, payable thereon. Whatever other benefits which are now being enjoined by the casual labourers shall continue to be extended to them."

3.10. Learned Counsel for the petitioner has also contended that once by virtue of the aforesaid orders, benefits are to be given to some of the employees of the Forest Department then present petitioners who were also employees of the Forest Department, the same benefits may be given to them.

3.11. Learned Counsel for the petitioner has also submitted that once the award is passed which was confirmed upto High Court and Hon''ble Supreme Court, the award is binding on the Forest Department and the Forest Department must confer these benefits to the other employees of Forest Department.

3.12. In support of the same, he has relied upon judgment of the Hon''ble Apex Court in the case of G. C. Agarwal v. CIT wherein para 2 the Hon''ble Supreme Court observed that in that case in view of the decision of the Allahabad High Court certain benefits to be given to the Northern employees; the same benefits should be given to the Eastern railway employees also.

3.13. Learned Counsel for the petitioner has relied upon the judgment of the Hon''ble Supreme Court in the case of Shreedharan Kallat Vs. Union of India and others, . In para 4 on page 641 the Hon''ble Supreme Court has observed as under:

"The first four issues having been settled by the judgment of the High Court, the Tribunal committed act of grave impropriety in attempting to reopen it. Such practice of the Tribunal cannot be commended. It has interfered at the instance of the respondents who were not adversely affected. The judgment was binding on Railways. It could not once again take up those very pleas which were rejected by the High Court. Such unwarranted stand by public authorities results in protected litigation involving wastage of money and time."

3.14. The learned Counsel for the petitioner has submitted that forest is an industry. In support of the same he has relied upon the judgment of Allahabad High Court in the case of State of U.P. and Another Vs. P.O., Industrial Tribunal (III) and Others, where in paras 6 and 7 on page 598 the Court (Coram : A. B. Srivastava, J.) has held as under :

"Para 6. That the Udyan is an industry and the Respondents No. 3 in each of these petitions are workmen covered by the Industrial Disputes Act, 1947, is concluded by the principles laid down by the Supreme Court in Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., . In the said case also relating to the Forest Department, while executing a scheme framed as per Government Resolution for creation of the park under bioaesthetic development for the benefits of urban population, the Pune Forest Division's function was held not to be a part of sovereign function of the State and the Forest Department qua the scheme was held to be an "industry" within the meaning of Section 2 (j) of the Industrial Disputes Act, 1947."

"Para 7. In the instant case also the establishment and maintenance of the Prani Udyan, a sort of zoological Garden, cannot be regarded as inalienable function of the State and consequently the same is an industry and the provisions of the Industrial Disputes Act, 1947 were clearly attracted.

The reference to the Industrial Tribunal thus was competent."

3.15. The learned Counsel for the petitioner has also relied upon the Division

Bench Judgment of Punjab and Haryana High Court in the case of Divisional Forest Officer, Social Forestry Project Vs. Presiding Officer, Industrial Tribunal and Another, , wherein on page 1188 in para 13 the Court has observed as under :

"It is, thus, clear from the test laid down by the Apex Court in Bangalore Water Supply and Sewerage Board's case (supra) and the observations of the Supreme Court in Jagannath Maruti Kondhar's case (supra) that sovereign functions strictly understood (alone) qualify for an exemption not the welfare activities or economic adventures undertaken by the Government or statutory bodies. Even in the Government departments discharging sovereign functions, if there are units which are severable, then they can be considered to come within the meaning of "industry" as given in Section 2 (j) of the Act. Simply because the Forest Department of the State of Haryana has a noble objective and has undertaken the Forest Development Projects, by no stretch of imagination it can be said that the forest department discharges sovereign functions to qualify for exemption. The fact that the forest department is engaged in activities which do not necessarily make profits, does not alter the fact that it employs workers like the second respondent and carries on systematic activities which provide services for satisfying human wants for having pollution-free environment. In our opinion, therefore, having regard to the activities carried on by the forest department in the light of the test laid down in Bangalore Water Supply and Sewerage Board's case, the forest department is an "industry" as defined in Section 2 (j) of the Act."

3.16. Learned Counsel for the petitioner has also relied upon the Full Bench judgment of Kerala High Court in the case of Umayammal Vs. State of Kerala, . In para 18 the Court has held as under :

"In the light of the Supreme Court dicta we have to proceed on the basis that sovereign functions strictly understood alone qualify for exemption not the other activities or economic adventures undertaken by Government or statutory bodies. Even in departments discharging sovereign functions if there are units which are industries and they are substantially severable then they can be considered to come within Section 2(j) of the Act. Where a complex of activities some of which qualify for exemption and others not, involved employees of the total undertaking some of whom are not workmen and some departments are not productive of goods and services if isolated even then the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur case will be the true test."

4. On behalf of State, Shri A. D. Oza, learned Government Pleader assisted by Shri H. C. Patel and Mrs. Parekh LD. AGP appeared.

4.1. Learned Counsel for the State has also relied upon the judgment of the Hon"ble Apex Court decided in the case of Civil Appeal No. 1684 of 1998 decided in the case of Civil Appeal No. 1684 of 1998 decided on 31-1-2001, in the case of State of Gujarat and Others v. Prathamsinh Narsinh Partnar which also relates to

forest department. In that case, the facts as emerged from the record that the Deputy Conservator of forest, Navsari recruited certain clerks on purely temporary basis liable to be discharged at any time without notice and without assigning any reason the appointment for a period of 29 days. On 28-3-84 the services of the petitioners in that case were terminated and they were relieved.

4.1(A). Being aggrieved and dissatisfied with the said order of termination, some of the petitioners filed Special Civil Application No. 1777 of 1984 before this Court. This Court by its judgment and decree dated 12-1-96 held that after the judgment of the Hon"ble Apex Court in Bangalore Water Supply's case, it has been held that submission made on behalf of the department cannot be accepted and case has to proceed on the premises that the forest department is an industry and the petitioner who was working as clerk "was a workman within the meaning of respective sections of the Industrial Disputes Act as aforesaid. As there was violation of Section 25 (f) the termination was held to be illegal and petition was allowed and termination order was quashed and set aside.

4.1(B). Being aggrieved and dissatisfied with the aforesaid judgment and order of the learned Judge, the State through Principal Chief Conservator of Forests had filed Letters Patent Appeal No. 537/96. The Division Bench of, this Court after considering the Bangalore Water Supply's case and also considering the Chief Conservator of Forest and Others (since reported in 1999 (1) GLH 591 held that the learned Single Judge has not committed any error of law and the appellant cannot make any grievance. However, as regards backwages, the Division Bench has modified the award and giving 65% backwages.

4.1(C). Being aggrieved and dissatisfied with the aforesaid judgment and order of the Division Bench, judgment, the State filed appeal before the Hon"ble Supreme Court of India. The Hon"ble Supreme Court after referring to the judgment of Bangalore Water Supply and Sewerage Board v. [(1978) SCC 213] and also judgment of Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., on page 3 the Hon"ble Supreme Court has observed as under :

"If a dispute arises as to whether a particular establishment or part of it wherein an appointment has been made is an industry or not, it would be for the person concerned who claims to the conclusion that it constitute "an to the conclusion that it constitute "an industry". Ordinarily, a Department of the Government cannot be held to be an industry and rather it is a part of the sovereign function."

4.2. On page 4 as regards judgment of Jagannath Maruti Kondhare's case (supra), the Division Bench of the Hon"ble Supreme Court has observed as under :

"We are afraid that the aforesaid decision cannot have any application to the facts of the present case where there has not been any assertion of fact by the petitioner in establishing that the establishment to which he had been appointed is "an industry". In this view of the matter, we have no hesitation to come to the

conclusion that the learned Single Judge as well as the Division Bench committed serious error of law in holding that to the appointment in question, the provision of the Act apply. We would accordingly set aside the judgment of the Division Bench as well as that of the learned Single Judge and hold that the writ petition would stands dismissed.

4.2(A) He has relied upon the judgment of the Hon"ble Apex Court in the case of Executive Engineer (State of Karnataka) Vs. K. Somasetty and others, . In that case question was regarding employee of irrigation department and Telecommunication Department are not an "Industry" within the meaning of definition under the Act and after referring the judgment of the Hon"ble Apex Court in the case of Union of India (UOI) Vs. Jai Narain Singh, and also in the case of State of Himachal Pradesh Vs. Suresh Kumar Verma and another, , the Hon"ble Supreme Court has observed as under :

"The function of public welfare of the State is a sovereign function. It is the constitutional mandate under the Directive Principles, that the Government should bring about welfare State by all executive and legislative actions. Under these circumstances, the State is not an "industry" under the Industrial Disputes Act. Even otherwise, since the project has been closed, the respondent has no right to the post since he had been appointed on daily wages. It is brought to our notice that respondent has been reinstated. The order of the reinstatement has been placed before us which indicates that at the threat of contempt of Court, the order has been enforced. It is stated therein that it is subject to the final order of this Court in this appeal."

4.3. Learned Counsel has also relied upon the Division Bench judgment of this Court in the case of Shankerji Cheljaji Thakor v. State of Gujarat, reported in 2000 (1) GLH 482. In para 18.1 after referring to the judgment of the Hon"ble Apex Court in the case of Executive Engineer (State of Karnataka) v. K. Somasetty AIR 1997 SCW 2627 and also the case of State of Himachal Pradesh Vs. Suresh Kumar Verma and another, , the Division Bench has observed as under :

"It is required to be noted that the fact that the State is duty bound to carry out its sovereign function. With a view to streamline the work that can be given regularly to the persons, a resolution of the State has been placed on record. It is very clear from the averments in the petition itself that the petitioners were mainly looking after the repairs of the canal, etc. Thus, they were engaged for the purpose of repairing and maintenance of the construction and canals. With a view to see that the persons who have worked for a longer period more than 240 days in a year continuously for a period of more than 10 years, by passing the resolution, the State extended the benefit. For getting the benefit, it is necessary that the person must have, if in the service, worked as contemplated in the resolution. As observed by the Division Bench, while deciding the L.P.A. held that daily worker who has continuously worked for more than 10 years, and in each year at least for 240 days, is entitled to the benefit of pension. Such a situation

being not present in the instant case, therefore, this L.P.A. must be dismissed, and is hereby dismissed.

4.4. Learned Counsel for the State has also relied upon the judgment of this Court in the Special Civil Application No. 4718 of 1997 decided on 8-5-2000 by this Court (Coram : J. M. Panchal and A. M. Kapadia, JJ.). In para 10 the Division Bench observed as under :

"It may also be mentioned that Supreme Court in Delhi Development Horticulture Employees (supra) has deprecated back door entry in service under so-called right of the employees to regularization. For regularization there must be regular and permanent post or it must be established that although work of regular and permanent nature is available the device of appointment and keeping the workers on ad hoc or temporary basis has been resorted to, deny them the legitimate benefits of permanent employees. It is the specific case of the applicants that though the eight employees were recruited for specific purpose and duration they have been continued in service by assigning different kind of work on humanitarian grounds but the work of regular and permanent kinds for which they were recruited is not available. As observed earlier, the work which is being performed by the eight employees is neither regular nor of permanent nature. Moreover, as pointed out by Mr. Panday, in additional affidavit-in-reply Governor of Gujarat has made rules called "the watchmen (Forest Department) Recruitment Rules 1975" as well as the Khalasi (Gujarat Forests Inferior Service) Recruitment Rules 1977 in exercise of the powers conferred by the proviso to Article 309 of the Constitution, if the relief as claimed for by the respondents is granted it would amount to multiplying the rules framed by the Governor of Gujarat under Article 309 of the Constitution and such a course is not permissible to count while hearing a petition filed under Article 226 of the Constitution of India."

4.5. However, the learned Counsel for the petitioner has pointed out that though original learned Counsel for the petitioner workman had filed his vakalatnama only the Government Pleader was heard before the LPA and workman was not heard. So the workman had filed a Misc. Civil Appln. No. 1293 of 2000 in that LPA No. 1125 of 1997 with a request to quash and set aside the judgment on the ground that the learned Counsel for the workman was not heard. In this Misc. Civil Application in para 8 the Division Bench observed as under and recalled the earlier order.

"For the foregoing reasons, the application succeeds. The judgment dated 8-5-2000 rendered by us in Letters Patent Appeal No. 1125/97 is hereby recalled. The earlier orders passed in Letters Patent Appeal No. 1125/97 as well as in Civil Application No. 8793/97 which is filed in Letters Patent Appeal No. 1125/97 shall stand revived. Rule is made absolute with no order as to costs. Office is directed to place the L.P.A, for final hearing before the appropriate bench taking up such matter.

4.6. Learned Counsel for the petitioner has also relied upon another Full Bench judgment of Punjab and Haryana High Court in the case of State of Punjab Vs. Kuldip Singh and Another, . In para 37 on page 321 the Hon''ble Court has held as under :

"To finally conclude on an analysis of the binding precedent in the Bangalore Water Supply Board's case (supra), the language of Section 2 (j) of the Act, and on principle, it must be held that the establishment, construction and maintenance of national and State Highways is an essential governmental. It is in no way even remotely analogous to trade or business. Consequently, it cannot possibly come within the ambit of an "industry" as defined. The answer to the question posed at the very outset is thus rendered in the negative."

5. Learned Advocate for the petitioner stated that this Court must follow the judgment in the case of the Chief Conservator of forests and Another v. Jagannath Maruti Kondhara (supra) and another and also a Three Bench judgment in the case of General Manager, Telecom v. A. Srinivasa Rao and others (supra). He submitted that judgment of the Hon''ble Supreme Court in the case of State of Gujarat v. Prathamsinh Narsinh Parmar (supra two bench) does not lay down correct law and same is contrary to and inconsistent with the three bench judgment of the Hon''ble Supreme Court. He further submitted that judgment of this Court in Shankarji Cheljaji Thakor v. State of Gujarat (supra) does not lay down the correct law because in that case the Division Bench has relied upon two bench judgment in the case of Executive Engineer, State of Karnataka v. K. Somasetty (supra). He submitted that this two judgments of the Hon''ble Supreme Court delivered by two bench does not lay down the correct law in view of the subsequent development judgment in the case of General Manager. Telecom v. A. Srinivasa Rao (supra) (A three Judge Judgment).

6. On the other hand, learned Counsel for the State stated that there is a direct judgment of the Hon''ble Supreme Court in the case of State of Gujarat v. Prathamsinh Narsinh Parmar where State of Gujarat was a party before the Hon''ble Supreme Court and when the Hon''ble Supreme Court has already considered three bench judgment in the case of Jagannath Maruti Kondhara's case (supra) the ratio of the said judgment is binding on this Court.

7. In my view this petition raises the very important question of law as to whether the forest-department is an industry or not and whether the forest industry is a sovereign function of the State or not. In this case, I have considered the judgment of the Hon''ble Apex Court in the case of Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., (a three bench judgment) and also an unreported judgment of the Hon''ble Apex Court decided in the case of Civil Appeal No. 1684 of 1998 decided on 31-1-2001 in the case of State of Gujarat and others v. Prathamsinh Narsinh Parmar which relates to the forest department of the State of Gujarat where the Hon''ble Supreme Court has held that the Forest Department is not an industry. However, whether the judgment in the case of Jagannath Maruti Kondhara and Others

(supra) lay down a correct law and binding decision to this Court or whether the judgment of the Hon''ble Supreme Court in the case of State of Gujarat v. Prathamsinh Narsinh Parmar (supra) lay down a correct law and binding decision to this Court or whether the judgment of the Hon''ble Supreme Court in the case of State of Gujarat v. Parthamsinh Narsinh Parmar (supra) lay down a correct law and binding decision is to be considered by this Court. In my view, it would be better if Division Bench of this Court may consider both these decisions and lay down a binding law as to whether which judgment of the Hon''ble Supreme Court is binding, it would be fitness of things in this behalf.

7.1. Referring this matter to Division Bench also there is one additional reason, namely, I have already referred the earlier judgment of this Court decided on 10th November 2000, in Special Civil Application No. 9002/93 decided by (Coram : P. B. Majumdar, J.), being aggrieved and dissatisfied with the said order, a Letters Patent Appeal is already filed and same is pending before this Court, So I refer this matter to Division Bench the parties will save time, energy and money because the Division Bench has already seized the matter in this behalf. :

7.2. Before the Division Bench, the Division Bench will consider the following questions :

(1) Which judgment of the Hon''ble Supreme Court, namely, in the case of Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., (three Bench judgment) or a judgment of the Hon''ble Apex Court in the case of State of Gujarat and Others v. Prathamsinh Narsinh Parmar (supra) decided on 31-1-2001 in Civil Appeal No. 1984 of 1994 lay down a correct law and binding to this Court ?

(2) Whether Forest Department of the "State" is an industry or not ?

(3) Whether the petitioners or similarly situated employees of the Forest Department are entitled for the benefit of Government Resolution dated 17-10-1988 ?

I, therefore, direct the office to place the aforesaid matters before the Hon''ble Chief Justice to pass a necessary order for placing the aforesaid matters before the Division Bench.